

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

DONALD MOXLEY,	)	
Plaintiff,	)	
	)	
vs.	)	1:06-cv-1843- RLY-TAB
	)	
CIRCUIT CITY STORES, INC.,	)	
Defendant.	)	

**ORDER ON PLAINTIFF'S DISCOVERY MOTION**

Plaintiff filed this action in November 2006. From that time until the instant discovery dispute arose, Plaintiff's counsel did not demonstrate much interest in this case. Defendant's response to Plaintiff's pending discovery motion sets forth an accurate and telling procedural history. [Docket No. 40 at 1-8.] <sup>1</sup> The Court need not repeat that history here, other than to observe that Plaintiff's counsel has failed to appear, missed deadlines, and otherwise did very little on this case until the eve of the liability discovery deadline.

By that time, the Court already had enlarged this deadline twice. In the original case management plan, approved by the Court on April 23, 2007, the discovery deadline on issues of liability was October 27, 2007. [Docket Nos. 14, 16.] On June 4, 2007, the Court enlarged all CMP deadlines by 60 days in response to a telephonic status conference with the parties. [Docket No. 19.] The Court then approved a revised CMP further enlarging the discovery deadline on issues of liability to January 25, 2008. [Docket No. 26 at 5.]

Plaintiff first requested the discovery he seeks the Court to compel Defendant to produce on January 24, 2008, when Plaintiff asked for "all material that you used in preparing for the

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<sup>1</sup> Plaintiff filed no reply to Defendant's response.

deposition of Mr. Moxley and that you presently have that may present a defense for Circuit City or otherwise are related in any way with the subject matter of the deposition of Mr. Moxley, your investigation into the case, or Mr. Moxley's employment with Circuit City, absent impressions and discussions with your client involving how you would prosecute this matter." [Docket No. 40 at ¶ 35; Docket No. 41, Ex. X.]<sup>2</sup> Plaintiff explained in his letter to Defendant that this request should present no problem since he was only asking for what Defendant's counsel already currently had in his possession. [Docket No. 41, Ex. X; Docket No. 39 at 2.] On January 25, 2008, Defendant objected to production of such documents, explaining to Plaintiff that the local rules require requests for production of documents be served 30 days prior to the discovery cut-off date.

The local rules do not explicitly require the timing Defendant suggests. However, the reasoned practice in the Southern District of Indiana is that written discovery requests must be made a full 30 days prior to the discovery deadline to allow for a full response time. The form for CMPs in the Southern District of Indiana contains the following discussion on the use of the term "completed":

The term "completed," as used in Section III.B "[a]ll discovery shall be completed", means that counsel must serve their discovery requests in sufficient time to receive responses before this deadline. Counsel may not serve discovery requests within the 30-day period before this deadline unless they seek leave of Court to serve a belated request and show good cause for the same. In such event, the proposed belated discovery request shall be filed with the motion, and the opposing party will receive it with service of the motion but need not respond to the same until such time as the Court grants the motion.

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<sup>2</sup> Plaintiff also argues that at the close of discovery he had not received interrogatories from Defendant. However, Defendant responded to the request for interrogatories on January 25, 2008, the discovery deadline, so this part of the motion is moot. [See Docket No. 41, Exhibit Z.]

United States District Court Southern District of Indiana, INSD Forms,

<http://www.insd.circ7.dcn/Publications/Case%20Mgmt%20Plans/6-19-03UniCMP.pdf>.<sup>3</sup>

Likewise, the Northern District of Indiana has explained that “discovery requests served less than the 30 days provided by the Federal Rules within which to respond are made at the risk of non-compliance before the end of the discovery period.” *Gernaat v. Four Star Taxi, Inc.*, No. 2:07-cv-83, 2008 WL 835698, at \*1 (N.D. Ind. March 25, 2008); *see also Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (“When parties wait until the last minute to comply with a deadline, they are playing with fire.”). For these reasons, Plaintiff’s request that the Court compel discovery is denied.

Plaintiff also requests the Court to extend the discovery deadline or to sanction Defendant by not allowing it to use any documents associated with the depositions Plaintiff was unable to conduct but had requested of Defendant. On January 17, 2008, Plaintiff requested depositions for Howie Chou, Steve Kannottz, Allen McCoullogh, Rebeka Cooper, and Mark Galbert. Defense counsel took Plaintiff’s deposition on January 21, 2008, and as of that time defense counsel purportedly had been unable to discuss Plaintiff’s deposition requests with Defendant due to the Martin Luther King, Jr. holiday weekend. [Docket No. 40, ¶ 32.] Plaintiff also asserts that at his deposition he asked Defendant if Clarke, the person who fired Plaintiff, still worked for Circuit City and would be available for deposition, and was told that Clark did

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<sup>3</sup> The CMP approved in this case does not include this provision, presumably because the version of the form CMP in effect when the CMP was submitted included this language as a footnote to Track 1 of various suggested case management tracks. When Track 1 was deleted (as occurred in this case, which proceeded under Track 2) the footnote also was deleted. The location of this footnote in the form CMP has subsequently been moved to avoid this result.

still work for Circuit City. [Docket No. 39, ¶ 5.] On January 22, 2008, Plaintiff sent Defendant a fax indicating he also wanted to depose Clarke, who had been left off the list, and that Plaintiff would be unable to conduct the depositions on a day previously proposed. [Docket No. 41, Ex. V.] Plaintiff asserts that Defendant notified him that same day saying Defendant needed additional time to secure the parties requested for the depositions. Plaintiff says he “did not object believing that defendant would make the parties available for deposition in a timely manner even if after the CMP’s planned end of discovery for liability issues.” [Docket No. 39, ¶ 10.]

On January 24, 2008, Defendant sent Plaintiff a letter by fax indicating that David Clark, Rebekah Cooper, Alan McCollough, and Howard Chow were no longer with Circuit City. [Docket No. 41, Ex. W.] Additionally, Circuit City had no record of Mark Galbert, but suggested Plaintiff meant Mark Gabbard, who was no longer with Circuit City. [*Id.*] Likewise, it had no record of Steve Kannottz but suggested Michael Kanotz. [*Id.*] Circuit City concluded by objecting to any further discovery in this case, which “has been dragging on for quite some time.” [*Id.*] Based on this sequence of events, Plaintiff claims that “Defendant negligently or intentionally misled plaintiff so as to gain an advantage in determination of matters crucial to the case.” [Docket No. 39, ¶ 26.]

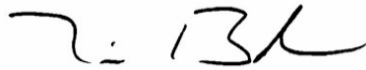
As a preliminary matter, Plaintiff has failed to comply with Local Rule 37.1, which requires Plaintiff to file with his motion a separate statement showing that his attorney made a reasonable effort to reach an agreement with opposing attorneys on the matter. Even overlooking this shortcoming, Plaintiff has failed to show excusable neglect for requesting an extension of time after the passing of the discovery deadline. *See* Fed. R. Civ. P. 6(b)(2);

*Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 464 (7th Cir. 2005). The Court understands that Plaintiff's counsel has had some health difficulties. Nevertheless, as demonstrated by the procedural history in this case, Plaintiff has had plenty of time to conduct discovery or timely request enlargements of time if needed, which the Court has been free to give. However, Plaintiff did not avail himself to these opportunities. Consequently, the Court denies Plaintiff's motion for extension of time on discovery.

In the alternative, Plaintiff requests sanctions be imposed on Defendant such that Defendant be precluded from using any documents "that were made or produced by individuals that Plaintiff requested depositions of, that defense counsel falsely acknowledged as being employees of defendant and later stating that they were not, or otherwise refused to make available." The present situation is primarily, if not completely, the result of Plaintiff's own procrastination. Accordingly, sanctions are not appropriate.

For the reasons set forth above, the Court denies Plaintiff's motion to compel documents and extend the discovery deadline or impose sanctions on Defendant. [Docket No. 39.]

Dated: 04/18/2008

A handwritten signature in black ink, appearing to read "T. Baker", written over a horizontal line.

Tim A. Baker  
United States Magistrate Judge  
Southern District of Indiana

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